



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: D. M. Baker
File: B-223091; B-223156
Date: August 11, 1986

DIGEST

Forest Service properly rejected bid as nonresponsive on timber sale where bidder failed to submit form 2400-43, Certification of Non-Substitution, since requirement was material term of the sale which cannot be waived after bid opening.

DECISION

D. M. Baker (Baker) protests the rejection of its bid as nonresponsive to the Pref Blowdown Salvage Timber Sale conducted by the United States Forest Service (Forest Service), Department of Agriculture. We deny the protest.

The sale prospectus advised that bids must contain completed form 2400-43, "Certification of Non-Substitution." Form 2400-43 is a statement from the bidder certifying that if awarded the contract the purchase will not constitute substitution, which is the purchase of unprocessed timber from National Forest System lands to be used as replacement for unprocessed timber from private lands that is exported by the purchaser. The regulations governing timber sales provide that in order to have a bid considered for a sale of timber from National Forest System lands in the contiguous 48 states, a person must certify that purchase of the timber does not constitute substitution. See 36 C.F.R. § 233.88 (1986).

Baker submitted the highest bid on the solicitation, but did not include form 2400-43 with its bid. Therefore, the Forest Service rejected Baker's bid as nonresponsive. Baker contends that the bid package that it received from the Forest Service did not contain form 2400-43 and it was unaware of the requirement for the form. Further, Baker argues that in light of the difference in price between it and the next highest bidder, the failure to include the form should be waived.

We find that the Forest Service properly rejected the bid as nonresponsive.

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It is a general principle of government contracting that responsiveness is determined at the time of bid opening and involves whether the bid as submitted represents an unequivocal offer to provide the product or service as specified, so that acceptance of the bid will bind the contractor to meet the government's needs in all significant respects. Any bid that is materially deficient in this regard must be rejected; a defect in a bid is material if it affects price, quality, quantity or delivery. See Johnson Moving & Storage Co., B-221826, Mar. 19, 1986, 86-1 C.P.D. ¶ 273. We find that Baker's failure to submit form 2400-43 was a material deviation from the terms of the sale, not a technicality, because Baker would not have assumed a legal obligation against substitution. The Forest Service reports that Congress has recognized the importance of the restriction against substitution by specifically including the restriction contained in form 2400-43 in the Forest Service's Appropriations Acts since 1974.

We are unpersuaded that Baker was unaware of the requirement for the form because, as indicated above, the prospectus specifically advised of the requirement for the form. Even accepting Baker's statement that it did not have form 2400-43 in its bid package, we find that Baker was on notice of the requirement and that its lack of knowledge was due to its own negligence in reading the prospectus.

Regarding Baker's argument that the failure to complete the form should be waived, a bid that is nonresponsive may not be corrected after bid opening, even though the bid may be more favorable to the government, since the nonresponsive bidder would receive the competitive advantage of choosing to accept or reject the contract after bids are exposed by choosing whether to make its bid responsive.

The protest is denied.

for Seymour Efron
Harry R. Van Cleve
General Counsel